

Date: February 18, 2020
From: Chief Legal Counsel Justin Kraske
To: Public Service Commissioners
RE: Revised Memorandum based on the right to know versus the right to privacy test under Montana law - Email breach and disbursement of emails outside of the Commission

Background

I previously sent the Commissioners and the ACT team an email about an email/data breach of the PSC's email system. I explained that at some point in the recent past dozens of emails of Commissioner Koopman's state email account ended up on the NorthWest Liberty News website during the week of January 13th. It appeared to be an internal PSC breach by someone that has administrator access to the PSC's email system and was not a records request. The website even says the emails were provided by a well-placed source. I have prepared this memo for my client the Commission, as they have a legal and public policy obligation to be aware of the details I have discovered about this email breach issue, what has transpired that is relevant to this issue, what legal issues this situation is causing and may cause to the Commission in the immediate future.

As you are all aware, when a records request is received requesting any staff or Commissioner's email, pursuant to the Bluebook the records request must be forwarded to the legal staff for review and compliance with state law and the Commission's email records request policy. Bluebook p. 21. There are many reasons why records requests are subject to legal review, this includes ensuring any non-work related emails are closely reviewed and any determined to be private or subject to redaction under Montana law are handled in an appropriate way

including balancing the right to privacy versus the right to know of the requestor. Otherwise there could be significant legal liability to the Commission and any employee that does not comply with Montana law and the Commission's email policy.

As I have previously mentioned in a prior attorney client privilege memorandum to the Commission on October 21, 2019, the agency, the Public Service Commission is my client, not individual Commissioners. According to the Montana Rules of Professional Conduct Rule 1.13, the agency as the organization is my client. I am obligated to protect and represent the agency and to ensure that the agency and its reputation as an institution is protected. I am required to make my client, the Commission aware of actions taken by any individuals which could damage or harm the credibility of the agency as a regulatory institution or could lead to legal liability.

According to the State Ethics Policy, State of Montana employees will conduct their duties for the benefit of the people of the state. Two main principles apply to conduct: public trust and public duty. Public employment is a public trust created when the public places its confidence in the integrity of public employees. Employees are encouraged to discuss or report any potential ethical violations with agency management before the action occurs.

Timeline of Events

I first became aware of the email breach issue when I was notified by Chairman Johnson that he was made aware of Commission Koopman's emails on the website by John Hines from NorthWestern Energy. I notified Commissioner Koopman about the breach shortly after my call from the Chairman. Once I realized the extent of the breach, including three very personal emails that impacted non-state employees, I contacted SITSD to report the IT breach on January 17th.

While I am not the supervisor of the IT system at the Commission, there are legal implications to this internal data breach and Montana law requires the agency to notify SITSD. I worked with two staff members at SITSD to make an oral report about the incident and provide the limited information I was aware of. I asked them if they could identify at that time who they could see in the IT system that had access to all Commissioner's emails. They stated that [REDACTED], the Commission's IT professional and [REDACTED], the Commission's Centralized Services Administrator had full access to all the agencies' emails. They also said there was an administrator function that could be designated to someone but they did not have further details about whether it was designated to someone else in any manner. Since it was a Friday afternoon they said they would follow-up with me the following week. They indicated that I should contact the Department of Administration Risk Management/Tort Defense about the issue. I contacted Risk Management/ Tort Defense and they asked me to complete a claim form which I did. I called the SITSD contact back early the following week and we missed each others' phone calls for about a week until I was notified that the matter was escalated to management at the Department of Administration.

SITSD investigated the email issue over the last few weeks and it was escalated to management. I was notified on Friday, February 7th involving the results of their investigation. When I talked to the manager at the Department of Administration on February 7, 2020, he notified me that the Chairman Brad Johnson around October or November of 2019 made a written request to the Department of Administration to request access to Commissioner Koopman's emails. During my initial investigation several weeks ago the Chairman stated to myself and another of the Commission's legal staff that the Centralized Services Administrator, [REDACTED] either made that request to the Department of Administration or assisted the Chairman in making that request through an SITSD form submission. He alleged that it was on

behalf of another Commissioner, but I do not have enough details at this time about that and the manager did not relay that to me.

SITSD also determined that it did not appear that this breach of emails constituted “personal information” as defined in Montana law so it did not trigger further disclosure to the Montana Department of Justice. [REDACTED]

I was also able to determine just recently the Commission’s communications director, [REDACTED] was given IT access to all five Commissioner’s emails likely without most Commissioners’ knowledge since around the time [REDACTED] started working at the Commission, which was almost nine months ago in May of 2019. It appears likely that the Commissioner email access [REDACTED] currently has may even allow him to write emails directly from all five Commissioner accounts which would appear to be coming from them directly to staff, constituents, and members of the public. This is very problematic for security and other reasons in the state email system however I will have to report this issue to SITSD and work with them to understand the full extent of the problems it causes. However, clearly if that is a process that was ever considered for one or more Commissioner email accounts, there needed to be a full discussion of this process in a public work session to discuss whether it is legal, compliant with SITSD policies, and so all Commissioners and staff are aware of the practice. That obviously did not occur and came into existence without the knowledge or review of the Commission’s legal staff, the majority of the staff at the Commission, and it appears various Commissioners.

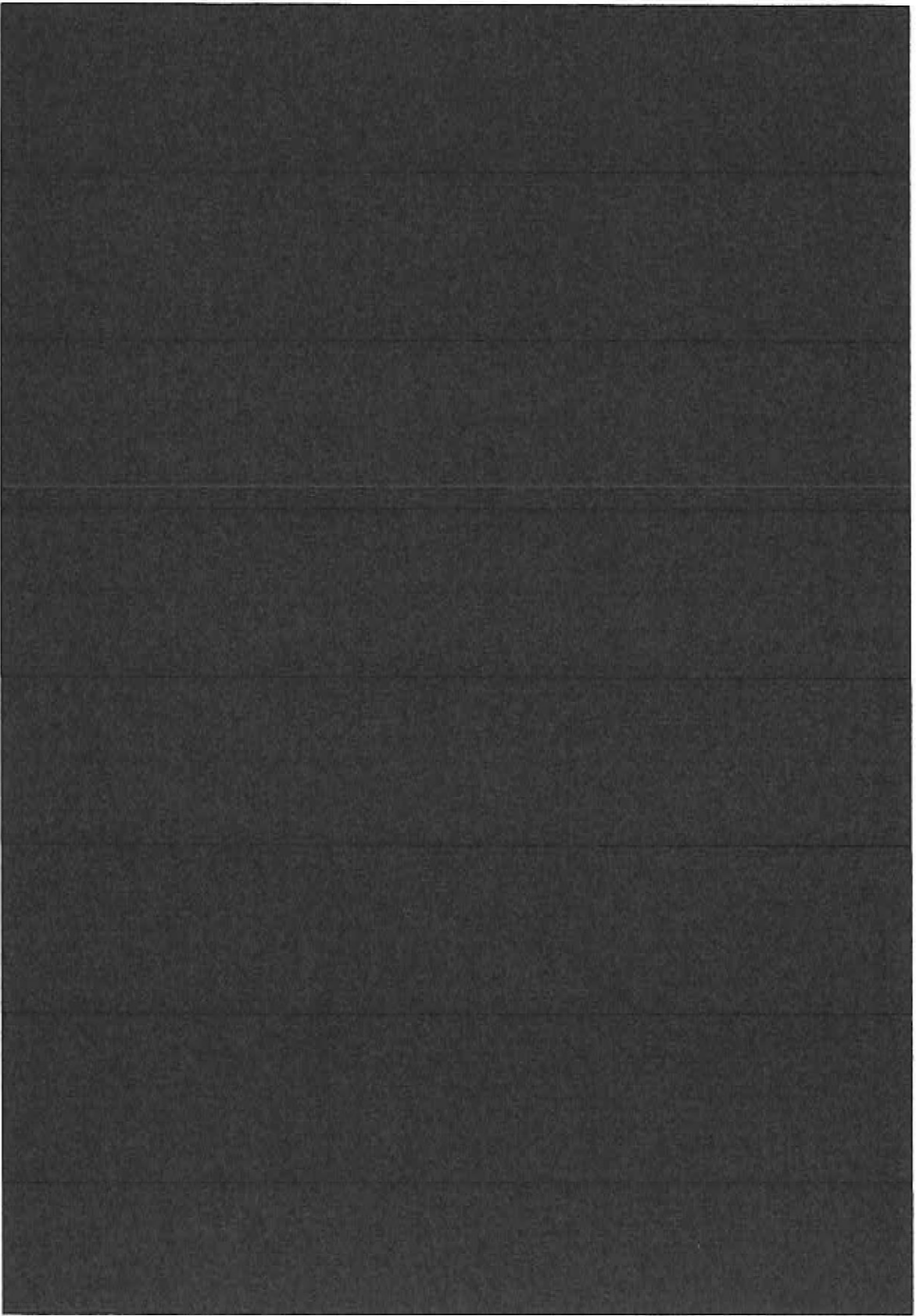
One reason a memo was not provided by email to Commissioners in advance of this meeting is it would go straight to [REDACTED] as he has full access to each Commissioner’s email. Any legal advice or attorney client communication relayed to Commissioners through the email system which [REDACTED] has access has likely waived the attorney

client privilege and could be subject to disclosure if requested by party or records request. This would include any attorney client memos, letters, litigation strategy etc. including likely my prior attorney client privilege memo from October 21, 2019. Initially this current memo has attorney client privilege protection however based on the details and personnel involved that will have to be balanced versus the right to know and a determination made.

Legal Implications

The list below is just an initial list of my myriad of legal concerns about [REDACTED], the Communications Director being assigned and granted full access to Commissioners' email accounts without their knowledge:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]



[REDACTED]

[REDACTED]

Just on Friday Mr. Zinecker sent an email to the entire Commission making light of the email breach and appeared to state that Commissioner Koopman had it coming and deserved it. [REDACTED]

[REDACTED]

